

学校编码: 10384

分类号\_\_\_\_\_密级\_\_\_\_\_

学 号: 13620100153495

UDC \_\_\_\_\_

厦 门 大 学

博 士 学 位 论 文

商业 银行 破 产 重 整 制 度 研 究

Research of Commercial Bank  
Bankruptcy Reorganization System

吴林涛

指导教师姓名: 朱 崇 实 教 授

专 业 名 称: 经 济 法 学

论文提交日期: 2013 年 4 月

论文答辩时间: 2013 年 6 月

学位授予日期: 2013 年 月

答辩委员会主席: \_\_\_\_\_

评 阅 人: \_\_\_\_\_

2013 年 4 月

商业  
银行  
破产  
重整  
制度  
研究

吴林涛

指导  
教师

朱崇实  
教授

厦  
门  
大  
学

## 厦门大学学位论文原创性声明

本人呈交的学位论文是本人在导师指导下,独立完成的研究成果。本人在论文写作中参考其他个人或集体已经发表的研究成果,均在文中以适当方式明确标明,并符合法律规范和《厦门大学研究生学术活动规范(试行)》。

另外,该学位论文为( )  
课题(组)的研究成果,获得( )课题(组)  
经费或实验室的资助,在( )实验室完成。

(请在以上括号内填写课题或课题组负责人或实验室名称,  
未有此项声明内容的,可以不作特别声明。)

声明人(签名):

200 年 月 日

# 厦门大学学位论文著作权使用声明

本人同意厦门大学根据《中华人民共和国学位条例暂行实施办法》等规定保留和使用此学位论文，并向主管部门或其指定机构送交学位论文（包括纸质版和电子版），允许学位论文进入厦门大学图书馆及其数据库被查阅、借阅。本人同意厦门大学将学位论文加入全国博士、硕士学位论文共建单位数据库进行检索，将学位论文的标题和摘要汇编出版，采用影印、缩印或者其它方式合理复制学位论文。

本学位论文属于：

（        ） 1. 经厦门大学保密委员会审查核定的保密学位论文，  
于        年        月        日解密，解密后适用上述授权。

（        ） 2. 不保密，适用上述授权。

（请在以上相应括号内打“√”或填上相应内容。保密学位论文应是已经厦门大学保密委员会审定过的学位论文，未经厦门大学保密委员会审定的学位论文均为公开学位论文。此声明栏不填写的，默认为公开学位论文，均适用上述授权。）

声明人（签名）：

200    年        月        日

厦门大学博硕士论文摘要库

## 内容摘要

优胜劣汰是市场经济发展的必然要求和内在规律，从理论上说，作为经济主体之一的商业银行也不能例外。然而商业银行作为一国金融体系的核心，承担着提供金融公共产品的职能，在社会公众的日常生活及金融体系的稳定运行方面均发挥着不可替代的作用。因此，对经营不善的商业银行而言，其破产退出有着不同于一般市场主体的特殊之处，一味的妥协救助或轻而易举的破产清算都并非解决问题的最佳选择。

在次贷危机和欧债危机接连爆发的背景下，我国应如何更为妥善地化解商业银行存在的危机就成为当前重要的课题。对危机银行的处置，本质上说是一个寻求金融稳定与金融效率均衡的过程。一直以来，我国都以接管、托管、关闭等行政手段来处置经营失败的商业银行。不同于上述手段，商业银行破产重整制度是以司法救助手段来挽救已经发生重整原因，但仍有改善希望的银行，更具有程序上的合法性和公信力。对那些经过行政接管和重整程序仍拯救无望的银行，及时清算退出也确保了其退出真正市场化。

本文包括绪论、正文和结束语等三大部分，正文共分为五章。具体观点如下：

绪论从论文的选题背景和研究意义着手，介绍了目前国内外关于商业银行破产重整问题的研究现状，说明了以商业银行破产重整制度为具体对象的研究内容、研究方法以及对我国具有的现实意义。

第一章阐述了商业银行破产重整制度的基本理论与发展概况。商业银行破产重整是指对已经破产或濒临破产但有生存希望的商业银行所实施的旨在维持或恢复其财务状况的一种积极措施。破产重整制度运用于商业银行，符合法律所追求的效率、秩序和平等价值。凯恩斯主义理论和成本——效率分析；社会连带学说；公司关系理论、公司的社会责任理论以及公司持续经营价值理论分别为其提供了经济学、社会学以及法学理论基础。此外，商业银行破产重整制度的基本原则应该包括：稳定优先、公开透明、最低成本、快速处置、权益均衡等五项。

第二章主要论述商业银行破产重整制度的参与主体以及它们在制度中的地位平衡问题。不同于一般破产重整，除债权债务关系人、法院及管理人以外，商业银行破产重整中还会有银行业监管机构、中央银行、财政部门、存款保险机构等其

他主体出现。其中，中央银行与财政部门应着眼于宏观，仅在确有必要动用公共资金时以“最后贷款人”的身份参与维持金融稳定；负有具体监管职责的银行业监管机构以及与危机银行有最大利害关系的存款保险机构则应全程参与商业银行破产重整。银行业监管机构负责对董事会成员、高级管理人员进行任免；联系购买与承接交易的对象；协调与其他部门之间的关系；根据监管性标准提起商业银行破产重整等。存款保险机构作为重整管理人之一，经营并维持商业银行的资产，提出重整方案，并在重整失败后有权申请其进入清算程序。但无论重整过程中有多少行政力量参与，商业银行破产重整程序都应在法院的管辖之下进行。

第三章讨论商业银行破产重整的启动标准和申请权问题。目前国际上通行的重整标准包括资产负债表标准、流动性标准和监管性标准。鉴于三种标准单独适用起来都有一定的缺陷，三者应同时被考虑设立为商业银行破产重整标准，在适用时互相补充、互为参考。实践中，特定的债权人、债务人及股东、银行业监管机构和存款保险机构都应该享有对危机银行破产重整的申请权。

第四章考察了商业银行破产重整方案和司法程序。重整方案是整个重整程序的核心，应由监管机构参与下的管理人来制定，制定期限为六个月并不得延期。重整方案中必须明确重整措施、债权债务清偿、方案的执行及期限等问题，监督方案执行情况的职责由监管部门承担。法院对以商业银行为对象的破产重整申请以形式审查为主，但对重整管理人的选任负有义务。重整方案未获得各表决组一致通过，经管理人及监管机构与未通过的债权人分组进行协商后二次表决仍未通过时，法院可以强制批准通过，但需满足最低限度的接受并符合公平合理原则。

第五章是关于我国商业银行破产重整制度的构建问题。由于我国目前实际上并未建立商业银行破产制度，本章结合正在起草的《银行业金融机构破产条例(草案)》，提出现阶段构建我国商业银行破产重整法律制度最重要的现实意义就在于，在公众心中树立“银行也是企业，银行也会破产”的风险意识。指出我国应结合国情，加快制定出台有关商业银行破产重整制度的特别立法，建立以银行监管机构为主导，法院适度参与并进行最终程序决策的破产重整制度。

结束语在总结全文的基础上，提出之所以选择用破产重整来解决商业银行运营中的危机，是由于这种制度既没有非常突出的优点，也没有明显的缺陷，是所有拯救手段中最平衡的制度。但毕竟重整制度设立的时间较短，运用于商业银行

时也涉及与其他学科交叉等问题，因此留下了许多问题供学者们继续探讨研究。

**关键词：**商业银行；破产重整；权力博弈

厦门大学博硕士论文摘要库

厦门大学博硕士论文摘要库



## Abstract

“Survival of the fittest” is inevitable demand and inherent law of market economy. As one of economic entity, commercial bank is theoretically not exception. However, the commercial bank is the core of a national financial system, with functions of providing financial public products. Therefore, bankruptcy and close down of a badly-managed commercial bank is very different from an ordinary market entity. Compromising and assisting a bank blindly, or implementing bankruptcy liquidation recklessly is neither the best choice to solve the issue.

In the context of continuously breaking out of sub-prime mortgage crisis and European debt crisis, a vital issue that China encounters currently is how to defuse existing crisis in commercial banks. Essentially, resolving a bank crisis is a process of exploring financial stability and efficiency equilibrium. For a long time, China tries to manage with some administrative measures to deal with those unsuccessful commercial banks, such as taking over, trusteeship, or close-down. Different from above means, the commercial bank bankruptcy reorganization method is more procedurally legal and credible, as it use judicial aid method to save commercial banks, which are still hopeful and suitable for reorganization. Nevertheless, for those banks with no hope of saving, liquidation exit also ensures bank operation and even its exit veritably market-oriented..

This article includes three parts, which are introduction, main body and conclusion. And the main body is divided into five chapters. The specific point of view is as follows:

By analyzing the background and significance of the topic, the introduction part of the article introduces the researches of commercial bank bankruptcy reorganization made by scholars from China and other countries, explains clearly research content and methods of this article, as well as its practical significance to China.

The first chapter states some basic theories and development of commercial bank bankruptcy reorganization. Bankruptcy reorganization is a positive measure for maintaining or restoring the financial position of a bank already went bankrupt or is close to bankrupt, but is still hopeful. Applling bankruptcy reorganization system to commercial banks complies with the principle of efficiency, order, and equality value that a law pursuits. The “ Keynesian Theory”, “Cost-effectiveness Analysis”; “Theory

of Social Solidarity”; “Theory of Corporation Relationship”, “Corporate Social Responsibility Theory”, and “Corporate Sustainable Development Value Theory”, provide with theoretical basis of economic, sociology, and law respectively. Moreover, the fundamental principle of the commercial bank bankruptcy reorganization shall include five elements, namely, stable priority, open and transparent, lowest cost, and rapidly handling.

The second chapter mainly talks about the position and balancing of participants in the commercial bank bankruptcy reorganization. Deferent from general bankruptcy reorganization, bank bankruptcy reorganization participants includes the debtors, courts, managers, as well as Banking Regulators, Central Bank, the Department of Finance, Deposit Insurance Agency etc. Moreover, the Central Bank and finance sector should focus on macro-management and should only maintain the financial stability with public funds when it is necessary, with the identity as “lender of last resort”. Banking Regulators and Deposit Insurance Agency is ought to participate in the commercial bank bankruptcy reorganization. The Banking Regulator is responsible to appoint members of the Board of Directors, senior managements, contact buyers and coordinate with other departments. In addition, the Banking Regulator suggests the commercial bank bankruptcy reorganization in terms of the standard of regulatory. The Deposit Insurance Agency, as a reorganization manager, operates and maintains assets, and give advices on the plan of reorganization. Furthermore, the Deposit Insurance Agency, is entitled to access to the liquidation procedure when reorganized become failed. The commercial bank bankruptcy reorganization should submit to the jurisdiction of the court, no matter how many governmental powers participated in.

The third chapter discusses the issues of triggering commercial bank bankruptcy reorganization and its application rights. Currently, international accepted standard including: Balance Sheet Standards, Liquidity Standards, and Regulatory Standards. Since each standard has its particular flaw if use respectively, all three of these standards should be adhered to for the commercial bank bankruptcy reorganization, which ensures mutual supplementary. In practice, Specific creditors, debtors, shareholders, Banking Regulators, Deposit Insurance Corporations have the right to apply for reorganize bankruptcy about banking crisis.

The Chapter four investigates the scheme of the commercial bank bankruptcy reorganization and the judicial procedure. This scheme is the core of the whole reorganized program, shall be developed by the manager with the involvement of regulators, and shall be six month without expiration. The responsibility of the

department of regulator is supervising scheme. Besides, the reorganized scheme shall state clearly the measures of reorganization, creditor's rights debt paying off, detailed implementation programs and deadline. The court conducts formal examination of application of bankruptcy reorganization of the commercial bank, and has an obligation to select reorganized managers. If a scheme of reorganization is not approved unanimously by each voting group, the manager and the regulator should negotiated with those opponents and put the scheme for a second vote. The court may approve a scheme by force if it is not approved in the second vote, but need to satisfied with the minimum margin and adhere to the principles of fairness and reasonableness.

Since China has not yet established a commercial bank bankruptcy system, Chapter five proposes that the realistic significance in Chinese commercial bank bankruptcy reorganization legal system is setting up a sense of risk in the public that "bank is enterprise, and may go bankrupt" in the light of drafting "Banking Financial Institutions Bankruptcy Ordinance". Therefore, China should quickly establish specific laws about the commercial bank bankruptcy reorganization system in accordance with national conditions. The system should be led by the bank regulator, with the court participate in and make final decision.

The conclusion part summarizes the article and points out that the choice of bankruptcy reorganization method to solve the crisis in commercial bank operation is mainly because that the system is with neither very prominent advantages, nor obvious defects, but is the most balanced one. After all, as the bankruptcy reorganization system is a newborn and it involves in many interdisciplinary issues when applied to commercial banks, there are many issues left for scholars to research further.

**Keywords:** The commercial bank; Bankruptcy; Bargaining power

厦门大学博士论文摘要库

目 录	
绪 论.....	1
第一章 商业银行破产重整制度的基本理论 .....	14
第一节 商业银行破产重整的概念界定 .....	14
一、商业银行破产重整的概念 .....	14
二、商业银行破产重整与相关概念的区别 .....	18
第二节 商业银行破产重整制度的理论基础 .....	26
一、商业银行破产重整制度的经济学基础 .....	26
二、商业银行破产重整制度的社会学基础 .....	30
三、商业银行破产重整制度的法理学基础 .....	32
第三节 商业银行破产重整制度的基本原则 .....	36
一、稳定优先 .....	36
二、公开透明 .....	37
三、最低成本 .....	38
四、快速处置 .....	39
五、权益均衡 .....	40
第四节 商业银行破产重整制度的价值及现实意义 .....	42
一、商业银行破产重整制度的价值 .....	43
二、对危机商业银行进行破产重整的现实意义 .....	48
第五节 商业银行破产重整制度的立法模式 .....	52
一、普通立法 .....	53
二、专门立法 .....	55
本章小结 .....	59
第二章 商业银行破产重整的参与主体以及权益平衡 .....	61
第一节 商业银行破产重整的参与主体 .....	61
一、中央银行、财政部门、银行业监管机构 .....	61

二、存款保险机构 .....	67
三、法院 .....	76
四、债权人 .....	78
五、管理人 .....	80
六、重整银行及股东 .....	82
<b>第二节 参与主体在商业银行破产重整程序中的权益平衡 .....</b>	<b>85</b>
一、行政权力平衡问题 .....	86
二、公权力与私权利的界限问题 .....	88
三、行政权与司法权的冲突问题 .....	90
<b>本章小结 .....</b>	<b>92</b>
<b>第三章 商业银行破产重整的启动标准和申请权 .....</b>	<b>94</b>
<b>第一节 商业银行破产重整程序的启动标准 .....</b>	<b>94</b>
一、商业银行破产重整的启动标准 .....	95
二、典型国家关于商业银行破产重整启动标准的规定以及评析 .....	106
<b>第二节 商业银行破产重整程序的申请权配置 .....</b>	<b>108</b>
一、商业银行的破产重整申请人 .....	109
二、典型国家关于商业银行破产重整申请配置权的比较研究及其评析 ...	115
<b>本章小结 .....</b>	<b>118</b>
<b>第四章 商业银行破产重整的重整方案和司法程序 .....</b>	<b>121</b>
<b>第一节 商业银行破产重整方案的制定、通过、执行、监督 .....</b>	<b>121</b>
一、商业银行破产重整方案的制定 .....	122
二、商业银行破产重整方案的分组、表决与通过 .....	132
三、商业银行破产重整方案的执行与监督 .....	136
四、商业银行破产重整方案中须注意的一些特殊问题 .....	140
<b>第二节 商业银行破产重整中的司法程序 .....</b>	<b>149</b>
一、对破产重整申请的审核和受理 .....	150
二、对破产重整管理人的选任 .....	152
三、重整债权人的确认以及组织债权人会议 .....	155
四、重整方案的批准和强制批准 .....	161

五、债权人利益遭到侵害时的权利救济 .....	164
六、重整程序的终结 .....	166
本章小结 .....	168
<b>第五章 我国商业银行破产重整的制度构建 .....</b>	<b>170</b>
<b>第一节 我国商业银行破产重整制度的现状及构建意义 .....</b>	<b>170</b>
一、我国商业银行破产重整制度的立法现状 .....	171
二、我国商业银行破产重整制度的构建意义 .....	178
<b>第二节 我国商业银行破产重整的公权力参与主体与重整启动 .....</b>	<b>181</b>
一、我国商业银行破产重整程序中的公权力参与主体 .....	182
二、我国商业银行破产重整的启动 .....	188
<b>第三节 我国商业银行破产重整制度的立法与运作 .....</b>	<b>195</b>
一、我国商业银行破产重整制度的立法及权力运行模式 .....	195
二、我国商业银行破产重整程序的具体运行 .....	199
<b>第四节 我国商业银行破产重整制度构建中的特殊问题 .....</b>	<b>209</b>
一、我国商业银行破产重整与接管、清算程序的衔接问题 .....	209
二、我国商业银行破产重整财产界定 .....	212
三、我国商业银行破产重整程序的流程及期限表 .....	213
本章小结 .....	216
<b>结束语 .....</b>	<b>218</b>
<b>参考文献 .....</b>	<b>221</b>
<b>后 记 .....</b>	<b>235</b>

厦门大学博士论文摘要库



Degree papers are in the "[Xiamen University Electronic Theses and Dissertations Database](#)". Full texts are available in the following ways:

1. If your library is a CALIS member libraries, please log on <http://etd.calis.edu.cn/> and submit requests online, or consult the interlibrary loan department in your library.
2. For users of non-CALIS member libraries, please mail to [etd@xmu.edu.cn](mailto:etd@xmu.edu.cn) for delivery details.

厦门大学博硕士论文摘要库